

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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PEPPERELL BRAIDING CO.,

Plaintiff,

vs.

ECF CASE

TONER PLASTICS, INC., STEVEN GRAHAM,  
and WAL-MART STORES, INC.,

Docket No. 1:08-cv-00383-DLC

Defendants.

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**ANSWER AND AFFIRMATIVE DEFENSES OF DEFENDANTS  
TONER PLASTICS, INC. and STEVEN GRAHAM**

Defendants Toner Plastics, Inc. ("Toner Plastics") and Steven Graham ("Graham") (hereinafter also collectively referred to as the "Answering Defendants") respond to the Complaint of Plaintiff Pepperell Braiding Co. (hereinafter referred to as the "Plaintiff") as follows:

1. The Answering Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1 of the Complaint.
2. The Answering Defendants admit the allegations contained in paragraph 2 of the Complaint.
3. The Answering Defendants admit the allegations contained in paragraph 3 of the Complaint.
4. The Answering Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 of the Complaint.

5. The allegations contained in paragraph 5 of the Complaint constitute conclusions of law for which no response is necessary. To the extent that a response is required, the Answering Defendants deny the allegations contained in this paragraph.

6. The allegations contained in paragraph 6 of the Complaint constitute conclusions of law for which no response is necessary. To the extent that a response is required, the Answering Defendants deny the allegations contained in this paragraph.

7. The Answering Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 7 of the Complaint.

8. The Answering Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8 of the Complaint.

9. The Answering Defendants deny the allegations contained in paragraph 9 of the Complaint.

10. The Answering Defendants deny the allegations contained in paragraph 10 of the Complaint.

11. The Answering Defendants deny the allegations contained in paragraph 11 of the Complaint.

12. The Answering Defendants deny the allegations contained in paragraph 12 of the Complaint.

13. With respect to the allegations contained in paragraph 13 of the Complaint, the Answering Defendants admit that Toner Plastics markets and sells bead and jewelry cord in the United States and deny the remaining allegations contained in said paragraph.

14. With respect to the allegations contained in paragraph 14 of the Complaint, the Answering Defendants deny that the packaging used by Toner Plastics is “confusingly similar”

to Plaintiff's packaging, deny that Toner Plastics uses a "mark" similar to any "mark" used by Plaintiff, state the photographs attached as an exhibit to the Complaint speak for themselves and deny knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in said paragraph.

15. The Answering Defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 15 of the Complaint.

16. With respect to the allegations contained in paragraph 16 of the Complaint, the Answering Defendants admit that Wal-Mart has sold Toner Plastics' products in its stores, and denies the remaining allegations contained in said paragraph.

17. With respect to the allegations contained in paragraph 17 of the Complaint, the Answering Defendants state that the letters referenced in said paragraph speak for themselves, and deny the remaining allegations contained in said paragraph.

18. The Answering Defendants deny the allegations contained in paragraph 18 of the Complaint.

19. The Answering Defendants deny the allegations contained in paragraph 19 of the Complaint.

20. The Answering Defendants deny the allegations contained in paragraph 20 of the Complaint.

21. With respect to the allegations contained in paragraph 21 of the Complaint, the Answering Defendants repeat and reallege their responses to paragraphs 1 through 20 as if fully set forth herein.

22. The Answering Defendants deny the allegations contained in paragraph 22 of the Complaint.

23. The Answering Defendants deny the allegations contained in paragraph 23 of the Complaint.

24. With respect to the allegations contained in paragraph 24 of the Complaint, the Answering Defendants repeat and reallege their responses to paragraphs 1 through 23 as if fully set forth herein.

25. The Answering Defendants deny the allegations contained in paragraph 25 of the Complaint.

26. The Answering Defendants deny the allegations contained in paragraph 26 of the Complaint.

27. The Answering Defendants deny the allegations contained in paragraph 27 of the Complaint.

28. The Answering Defendants deny the allegations contained in paragraph 28 of the Complaint.

29. The Answering Defendants deny the allegations contained in paragraph 29 of the Complaint.

30. With respect to the allegations contained in paragraph 30 of the Complaint, the Answering Defendants repeat and reallege their responses to paragraphs 1 through 29 as if fully set forth herein.

31. The Answering Defendants deny the allegations contained in paragraph 31 of the Complaint.

32. The Answering Defendants deny the allegations contained in paragraph 32 of the Complaint.

33. The Answering Defendants deny the allegations contained in paragraph 33 of the Complaint.

34. The Answering Defendants deny the allegations contained in paragraph 34 of the Complaint.

35. With respect to the allegations contained in paragraph 35 of the Complaint, the Answering Defendants repeat and reallege their responses to paragraphs 1 through 34 as if fully set forth herein.

36. The Answering Defendants deny the allegations contained in paragraph 36 of the Complaint.

37. The Answering Defendants deny the allegations contained in paragraph 37 of the Complaint.

38. The Answering Defendants deny the allegations contained in paragraph 38 of the Complaint.

39. The Answering Defendants deny the allegations contained in paragraph 39 of the Complaint.

40. The Answering Defendants deny the allegations contained in paragraph 40 of the Complaint.

**AS AND FOR A FIRST AFFIRMATIVE DEFENSE**

41. Plaintiff's Complaint fails to state a claim against the Answering Defendants upon which relief can be granted.

**AS AND FOR A SECOND AFFIRMATIVE DEFENSE**

42. Upon information and belief, Plaintiff's claims are barred, in whole or in part, by the doctrine of waiver.

**AS AND FOR A THIRD AFFIRMATIVE DEFENSE**

43. Upon information and belief, Plaintiff's claims are barred, in whole or in part, by the doctrine of unclean hands.

**AS AND FOR A FOURTH AFFIRMATIVE DEFENSE**

44. Upon information and belief, Plaintiff's claims are barred, in whole or in part, by the doctrine of estoppel.

**AS AND FOR A FIFTH AFFIRMATIVE DEFENSE**

45. Upon information and belief, Plaintiff's claims are barred, in whole or in part, by the doctrine of laches.

**AS AND FOR A SIXTH AFFIRMATIVE DEFENSE**

46. Upon information and belief, the elements of Plaintiff's packaging that are at issue in this claim are functional and not protected trade dress.

WHEREFORE, Defendants Toner Plastics, Inc. and Steven Graham respectfully request judgment as follows:

- a) dismissing Plaintiff's Complaint with prejudice;
- b) awarding the Answering Defendants their costs of defending this action, including reasonable attorneys' fees, costs and disbursements; and
- c) granting such other, further and different relief as this Court may deem just and necessary.

DATED: Buffalo, New York  
March 24, 2008

GOLDBERG SEGALLA LLP

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